Supreme Court, U.S.
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No. 99-456

IN THE

Supreme Court of the United States

H. KEITH HENSON,

Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

This was a straightforward copyright infringement case. Its outcome was mandated by the uncontroverted facts, which were instrumental in the decisions reached by the district and circuit courts.

1. Petitioner ("Henson") copied, displayed and distributed ("posted") on the internet, on two occasions, the entirety of a two page copyrighted work of respondent Religious Technology Center ("RTC").

2. The work was unpublished.

3. The display and distribution of the work was not accompanied by substantial or meaningful commentary *about the work*.

4. Henson knew the work was copyrighted to RTC before he posted it. He was in court on two prior occasions in two separate cases in which the same district judge enjoined two other persons from infringing the same work in a similar manner.

5. After Henson first posted the work to the internet, RTC sent Henson a cease and desist letter. Henson's written response was: "take your demand . . . and stick it where the sun don't shine" (ER 89-91).[1/] He then reposted the work.

6. At the time of both of his infringements, and on several subsequent occasions, Henson openly solicited others to infringe the copyrights in RTC's unpublished works, and to send him copies of such works so that he could do so.

7. Henson admitted in testimony that he undertook the acts of infringement and solicitation of infringement to increase his status on the internet, for fun and entertainment, to harass RTC and drive up its legal expenses, and as revenge for RTC's having taken previous legal steps to enjoin several others from

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1/ References to "ER ___" are to the excerpts of record in the court of appeals.

virtually identical acts of infringement. Henson thus characterized his acts as "dealing with the jerks who pissed in my sandbox." (Trial Ex. 10-42).

No case permits such blatant abuse of the rights of a copyright holder. Where, as here, the entire body of an unpublished work is copied, displayed and distributed verbatim, there can be no fair use. Nor does the First Amendment protect such piracy of the *expression* (as opposed to the ideas) of a copyright holder, even for the purpose of criticizing that expression.

The petition thus fails to present legal questions appropriate for review by the Court for several threshold reasons: (1) the petition does not even purport to argue that the decision of the court of appeals conflicts with a decision of another circuit or of the Court; (2) the petition essentially asks the Court to review facts and the application of facts to established law, a task ordinarily not appropriate to the Court's certiorari jurisdiction; and (3) the petition raises questions not raised or preserved in the court of appeals. In addition, petitioner fundamentally misstates the record below, in disregard of the jury's verdict and specific findings of the district court, as affirmed by the circuit court, and fails to raise a compelling question requiring the Court's review.

Thus, while petitioner's first question presented proposes a *per se* rule "instructing courts to liberally apply the fair use factors to support First Amendment interests is cases involving noncommercial, political speech" (Pet. at 30), petitioner's basic premise underlying that proposal, that he copied the work as a good faith exercise in public comment and criticism, was explicitly rejected as a matter of *fact* by both judge and jury in the district court. The district court, in granting partial summary judgment on liability for copyright infringement, found that petitioner's "commentary," which accompanied the copying of the entire work, did not address the contents of the

work to any significant degree, thereby rendering the copying of the entire work gratuitous and in apparent "bad faith." The issue was revisited at the trial on statutory damages, at which the jury was required to determine whether or not petitioner's infringement was "willful." Petitioner's trial counsel[2/] was permitted to argue that petitioner's acts were not willful because he believed in good faith that his act of posting the work at issue was an exercise of comment or criticism constituting fair use; indeed, the district court instructed the jury that it could find in favor of petitioner on the issue of willfulness if he established such a good faith belief. Yet the jury rejected the defense, accepting respondent's argument that petitioner acted out of spite, malice, and to enhance his own status among the group of individuals who regularly participate on the internet newsgroup to which petitioner posted the work in question.

Thus, this case does not even begin to present the issue petitioner attempts to raise: whether his copying of an entire unpublished work is protected by the First Amendment because it was necessary to further a purpose of engaging in what petitioner denominates "political" speech. Indeed, petitioner did not raise such an issue on appeal, where he merely argued that he was entitled to copy, display and distribute the entire work because, in his distorted subjective view, it constitutes a "criminal instruction manual." The court of appeals' rejection

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2/ Contrary to a statement in the petition (Pet. at 7), petitioner did not act on a *pro se* basis prior to the jury trial because he could not afford legal representation. Rather, as petitioner gloated in various internet postings, he *chose* to proceed without a lawyer, despite at least four offers of *pro bono* assistance and despite the fact that he was a gainfully employed professional, because he believed it gave him an advantage in the proceedings, stating, "if I had a lawyer he would crimp my style . . ." (ER 556).

of that baseless argument does not present any question warranting the Court's review.

STATEMENT OF THE CASE

1. *The Work At Issue*

L. Ron Hubbard was the author of numerous original religious works of the Scientology religion, of which he was the founder. Many of Hubbard's works have been published and made generally available, while others have not. Among the unpublished works is a body of works referred to as the NOTs Series (ER 145). The Series is composed of 55 separate and discrete copyrighted "issues," identified by number, which are used by specially trained and qualified ministers of the Scientology religion in providing spiritual counseling to parishioners at a limited number of advanced Churches of Scientology (ER 3, 17-20, 73-75, 145-47). Each individual component of the NOTs Series – such as NOTs Series 34 – is separate, discrete, and finite, with an individual heading and closing, a start and a finish. (*Id.*)[3/]

[3/] Although NOTs Series 34 is registered as a component part of the NOTs Series, as the district court held, it is entitled to copyright protection as a separate work (ER 288 at n.3). Where, as here, a series of unpublished works is registered as a single collection, the registration "extends to each copyrightable element in the collection," 37 C.F.R. §202.3(b)(3)(B)(4); *American Geophysical Union* v. *Texaco, Inc.*, 802 F. Supp. 1, 17 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995) (for purposes of fair use analysis, "copyrighted work" is individual periodical article, even though copyright covered entire issue); *Szabo* v. *Errisson*, 68 F.3d 940, 943 (5th Cir. 1995) ("[W]hen one copyrights a collection, the copyright extends to each individual

After Hubbard's death in 1986, his estate granted to RTC an exclusive license in the NOTs copyrights (ER 34-47). RTC has received from the Register of Copyrights certificates of registration of these copyrights (ER 51-61). The registration certificates protect each NOTs issue as a separate work.[4/]

2. *Defendant's Infringement Of RTC's Copyright In NOTs 34*

Henson was in the courtroom on March 29, 1996, when District Judge Ronald M. Whyte, of the Northern District of California, ruled that he would issue a preliminary injunction prohibiting one Grady Ward from further infringing RTC's copyrights in certain unpublished religious works. *Religious Technology Center* v. *Ward*, No. 96-20207-RMW (N.D. Cal.) ("the *Ward* case") (ER 4-5). Ward had copied and distributed RTC's copyrighted works on the internet, was threatening imminent additional postings, and had publicly solicited copies of RTC's proprietary materials. The *Ward* injunction encompassed NOTs 34.[5/]

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work in the collection even though the names of each work are not expressly listed in the copyright registration," collecting cases). Henson does not argue that either *Texaco* or *Szabo* are incorrect as a matter of law, only that the district court somehow incorrectly applied them to the facts of this case.

[4/] The NOTs issues are of immense value as well as spiritual significance to RTC, which has taken extraordinary measures to protect their confidentiality (ER 4). *See Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231, 1254 (N.D. Cal. 1995).

[5/] Henson previously had attended a preliminary injunction hearing in another case before the same court, following which Judge Whyte enjoined one Dennis Erlich from infringing RTC's copyright in several unpublished works, including NOTs 34.

The next day, Henson electronically copied, transmitted and displayed ("posted") on an internet newsgroup called alt.religion.scientology, or "a.r.s.," a copy of NOTs 34 in its entirety. At the same time, Henson posted "An Open Letter to Judge Whyte," stating that he was in the courtroom at the Ward hearing and, in effect, daring the district court to enjoin him as well. Henson solicited additional copies of the NOTs Series, "stolen or not," to be sent to him (ER 73-87, 146). Only two sentences of Henson's two page "open letter" were directed at the contents of NOTs 34, and those sentences referred to only one paragraph, consisting of 33 words, of the two page work, which Henson nevertheless copied and displayed verbatim.

RTC immediately sent Henson a cease and desist letter (ER 181). Henson responded by: (a) telling RTC's counsel that she could "take [her] demand, fold it till it is all corners, and stick it where 'the sun don't shine'"; (b) reposting a copy of NOTs 34 on the internet; (c) soliciting additional copies of the NOTS Series "acquired by legal, or *illegal* means"[6/] from any and all internet users; and (d) threatening to post some or all of the NOTs Series works to the internet (ER 89-91).

3. *Proceedings In the District Court*

On April 4, 1996 RTC filed this copyright infringement action against Henson seeking injunctive and declaratory relief, statutory damages, and attorneys' fees. The district court issued a temporary restraining order on April 5 (ER 776), and a preliminary injunction on April 12, 1996 (ER 109-116).

Religious Technology Center v. *Netcom*, 923 F. Supp. 1231 (N.D. Cal. 1995).

[6/] The use of asterisks around words in postings to usenet newsgroups is the customary method of signaling emphasis.

On May 6, 1997, the district court granted RTC's motion to expand the preliminary injunction to encompass all of the copyrighted unpublished works of L. Ron Hubbard for which RTC is the exclusive copyright licensee (ER 302-310). The Court acted because on February 24, 1997, Henson had posted yet another message to the internet soliciting "various secret cult crap," which he explicitly threatened to post to the internet, and daring RTC to "get your act in gear and get my injunction extended" (ER 245).

On April 15, 1997, the district court granted RTC's motion for partial summary judgment on its copyright claims (ER 286-301). The court held that RTC owned an existing, valid and registered copyright interest in NOTs 34,[2/] and that Henson admitted copying it, knowing that it was copyrighted. The court rejected Henson's fair use defense, because *inter alia*, Henson's use "is only minimally transformative and does not appear to be in good faith" (ER 293); the work was unpublished; and Henson copied the work in its entirety.

The district court specifically rejected Henson's argument that his *verbatim* postings of the entire NOTs 34 work was justified under the fair use doctrine, or otherwise, because, according to Henson, the document encourages the illegal practice of medicine:

> Henson suggests that where there is a matter

[2/] *Accord, Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2nd 1569, 1572 (E.D. Va. 1996). Henson falsely claims that the validity of the copyright in NOTs 34 was called into question in *Bridge Publications, Inc.* v. *F.A.C.T.Net, Inc.*, 183 F.R.D. 254 (D. Colo. 1998). (Pet. at 5, n.3.) As Henson's counsel is well aware, the *F.A.C.T.Net* decision only addressed *published* Scientology works owned by *a different plaintiff*, Bridge Publications. The validity of the copyrights in the unpublished NOTs 34 most certainly *was not* at issue in *F.A.C.T.Net*.

> of public safety involved, the concept of fair use should be extended. . . . The limited commentary in Henson's posting does not reveal that Henson's purpose was to educate the public about the alleged criminal content of NOTs Series 34. Further, Henson does not sufficiently explain why he needed to post the entire text of NOTs Series 34 to educate the public.

(ER 291-92).

The district court issued a permanent injunction to prevent Henson from further infringing activity. The court reserved for trial determination of whether Henson's infringements were willful and the amount of statutory damages.

Trial commenced on May 5, 1998. The jury returned a verdict finding that Henson acted willfully in infringing RTC's copyright in NOTs 34, and assessed statutory damages in the amount of $75,000. The district court entered judgment on May 14, 1998 (ER 318). On June 9, 1998, Henson filed a motion for a new trial (ER 671), which the district court denied on September 28, 1998 (ER 763).

4. *Facts Adduced At Trial Relating To The Willfulness Of Henson's Conduct*

The trial focused on two matters: (1) if Henson's infringement of RTC's copyright was willful; and (2) the amount of damages to be awarded. Henson was the only witness; he was called by both sides. In addition, RTC introduced videotaped excerpts of Henson's deposition testimony.

RTC demonstrated that Henson knew his actions were in violation of federal copyright law; that he considered his infringements to have been committed for fun, entertainment,

and recreation; and that he used his copyright infringement to enhance his status among fellow participants in the "a.r.s." internet newsgroup, who regularly engaged in virulent attacks upon the Scientology religion.

When Henson posted NOTs 34, he knew it was copyrighted (ER 395). He stated, "I figured that there was a very fair probability that I was breaking a copyright law" (ER 465). In spite of his suspicions, Henson did not contact a lawyer, even though as a gainfully employed professional, he could afford to do so, and even though he had retained attorneys in the past with regard to other legal matters (ER 488). Nor did Henson bother to contact RTC to ask for permission to post NOTs 34 (ER 423-24).

Henson testified that he set out to taunt RTC because it was "a lot of fun" (ER 634) and "screamingly funny" (ER 613). In internet postings, Henson referred to RTC as a "punching bag" (ER381, 547) and an "expendable sparing[sic] partner" (ER 383-84, 550) that was to be used in preparation for other, apparently more formidable, opponents. Henson believed taunting RTC was fun. "If they take a hard line and sue, well, there is a limit on how many of these suits [RTC] can keep going, not to mention there is a certain degree of amusement value" (ER 406, 560). Indeed, Henson acknowledged that one of his motives was to drive up RTC's legal costs (ER 546,559-60).

Henson also volunteered that his actions were undertaken to enhance his status amongst those who participated in the "a.r.s." internet discussion group. According to Henson, depending on the level of engagement with RTC, an a.r.s. participant would increase his status (ER 412-13, 614, 617-18, 620-21, 623-25). Henson testified that when he received a cease and desist letter from RTC it was "*a major increment in status.*" (ER 614). Henson's efforts to increase his status on a.r.s. knew no bounds. He acknowledged that once he went so

far as to announce his *desire* to receive a status-enhancing cease and desist letter from RTC:

> Q: Did you let people know you'd received the letter?
>
> A: Oh, yes. Matter of fact, I printed it up and posted it on . . . the cork board where I work.
>
> Q: Right. And before you received the letter, did you indicate that you wanted to receive such a letter?
>
> A: I might have. It was quite a status symbol at that point.

(ER 618).

Finally, as already noted, Henson stated that he infringed RTC's works out of spite, to avenge RTC's successful efforts to enjoin others from similar acts. Trial Ex. 10-42. Indeed, at the conclusion of his trial testimony, when asked by his own counsel whether his "experience with this lawsuit ha[d] deterred [him] from ever posting such materials again," Henson could only answer, "I wouldn't do it openly" (ER 502)!

In the face of this evidence and his own testimony, Henson attempted to convince the jury that his copying of NOTs 34 was undertaken as an act of public criticism in a good faith belief that it was protected as fair use and under the First Amendment. His trial counsel was permitted to argue that defense to the jury (Tr. at 0358, 475-79, 679-80), and the court so instructed the jury (Tr. at 714).

The jury wasted little time in rejecting that defense. The combination of Henson's gratuitous and unnecessary posting of the entire work, his attitude toward RTC, the "entertainment" value he derived from his taunts, his interest in achieving enhanced status among the a.r.s. participants, and his vengeful motive led the jury to the only logical conclusion: that his copyright infringement was willful, and not undertaken in a

good faith effort to use the work "fairly" in furtherance of public debate or criticism. As the district court concluded:

> the evidence presented and attitude exhibited by Henson . . . during trial left the jury with little choice but to find that Henson's infringement was willful.

ER 765.

5. *Proceedings in the Court of Appeals*

Henson separately appealed the district court's permanent injunction order and its final judgment, which incorporated the jury's verdict. The court of appeals consolidated the two appeals.

In his brief in the appeal from the permanent injunction, Henson raised only one issue: that "plaintiff can make no copyright claims [for infringement of NOTs 34] because Congress has no authority under the Constitution to extend copyright protection to instructions for organized criminal activity." Henson did *not* argue that the fair use doctrine otherwise protected his copying NOTs 34, or that the fair use doctrine insufficiently protects First Amendment rights to "political" speech. Nor did he argue that his verbatim copying of NOTs 34 did not constitute copying an entire unpublished work.

The only issues Henson raised in his appeal from the jury verdict were the alleged insufficiency of evidence of willfulness, the alleged excessiveness of the verdict, several evidentiary rulings, and a frivolous claim of misconduct by plaintiff's trial counsel.

In a single opinion, the court of appeals rejected all of Henson's arguments and affirmed the judgment in its entirety. It held that Henson's verbatim copying of an entire unpublished work constituted infringement that was not justified as fair use.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Did Not Raise the Questions Presented Below

As we have shown, Henson did not raise any of the grounds presented in his Petition in his briefs to the court of appeals. The only question he raised in his appeal from the permanent injunction was whether copyright protection can extend to a document that Henson subjectively and falsely characterized as a "criminal instruction manual," an argument petitioner does not even attempt to raise here.[8] In particular, petitioner did not raise in his briefs on appeal any question concerning the purported tension or conflict between the copyright law and the First Amendment, nor did he attempt to argue that the district court's fair use analysis was incorrect or flawed.

This failure constitutes a waiver, and is fatal to the

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[8] Henson makes passing reference (Pet. at 6) to a district court decision, *United States* v. *Article or Device*, 333 F. Supp. 357 (D.D.C. 1971), which he mischaracterizes as forbidding "the Church" from claiming that its practices can help alleviate medical conditions. In fact, that decision and the decision of the court of appeals in the same case, *Founding Church of Scientology* v. *United States*, 409 F.2d 1146 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 963(1969), upheld the right of the Founding Church of Scientology to make representations in a religious context concerning the value of its practices. Scientologists believe that certain of their religious practices can assist in recovery from what they perceive to be the spiritual causes and effects of medical ailments, in a way that complements, but does not supplant, traditional medicine (ER 93-94, 103-107).

petition.[2]

II. Henson's First Proposed Ground For Review Does Not Raise A Substantial Federal Question, Or A Question Upon Which There Is A Division of Opinion Either Among The Circuit Courts Or With The Decisions Of This Court

Henson posits an inherent conflict between the Copyright Clause and the First Amendment that must be resolved by this case. But as even his petition implicitly acknowledges, both the Court and the circuit courts have encountered little difficulty in accommodating both constitutional provisions within the scope of traditional fair use doctrine, without creating the *per se* type rule Henson demands. The decision of the Ninth Circuit below is consistent with the decisions of other circuits and of the Court. If any potential conflict exists between the two provisions, it can be addressed if and when it arises, rather than in a wholly inappropriate case such as this,

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[2] *See, e.g., Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) (declining to address issue not raised in or considered by court of appeals); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"), *quoting Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) (declining to consider issue considered by district court but not raised before or considered by the court of appeals); *E.E.O.C.* v. *Fed. Labor Relations Auth.*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals"; dismissing writ of certiorari as improvidently granted); *Rogers* v. *Lodge*, 458 U.S. 613, 628, n.10 (1982) ("This contention was not properly raised in the Court of Appeals and was not addressed by that court. We therefore do not address it").

where the defendant knowingly and willfully infringed a copyright in an unpublished work by copying and distributing it in its entirety without significant commentary addressed to the content of the work.

That the First Amendment creates no conflict with the Copyright Act and provides no *per se* safe harbor for copyright infringement was expressly noted by Justice Brennan in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971):

> [C]opyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

403 U.S. at 726 (Brennan, J., concurring). See also *id.*, 403 U.S. at 731, n.1 (White, J., concurring) ("no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another").

The critical distinction, identified by Justice Brennan, is between speech concerning the *ideas* of a work, which is broadly protected, and appropriation of the *expression* of the copyright holder, which is not. *See* 17 U.S.C. § 102(a). The "uninhibited, robust and wide-open" debate on public issues which lies at the heart of the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), has never been deemed to be furthered by the wholesale theft of the very words of a previous speaker. "It should not be forgotten that the Framers intended copyright itself to be the engine of free expression . . . [by] suppl[ying] the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 558 (1985). Indeed, in *Harper & Row*, the Court expressly rejected virtually the identical argument petitioner posits now "for expanding the

doctrine of fair use to create what amounts to a public figure [or public interest] exception to copyright," holding that First Amendment protections are "already embodied" in the Act's expression/ideas dichotomy and the fair use doctrine. 471 U.S. at 560. The petition here constitutes nothing less than a frontal assault on *Harper & Row*, and a plea to overturn it.

Petitioner, however, can point to no reason, compelling or otherwise, to revisit the issue now, let alone in this case. The lower federal courts have consistently applied the idea/expression dichotomy and the fair use doctrine to protect both copyrightable expression and the free exchange of ideas. No conflict in the circuits has arisen, or is likely to arise. The courts of appeals have uniformly rejected the argument that the First Amendment trumps the copyright protection afforded by Article I, § 8, cl. 8 of the Constitution.[10/] To the contrary, every

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[10/] *See, e.g, Cable/Home Communications Corp.* v. *Network Prod.*, 902 F.2d 829, 849 (11th Cir. 1990) ("With respect to copyright protection, '[t]he first amendment is not a license to trammel on legally recognized rights in intellectual property' . . . . Since the Copyright Act is the congressional implementation of a constitutional directive . . . copyright interests must also be guarded under the Constitution") (quoting *Dallas Cowboys Cheerleaders, Inc.* v. *Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979)); *United Video, Inc.* v. *Federal Communications Commission*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989) ("The Constitution grants Congress the power to secure for limited times to authors the exclusive right to their works, and this power generally supersedes the first amendment rights of those who wish to use another's copyrighted work"); *Mitchell Bros. Film Group* v. *Cinema Adult Theater*, 604 F.2d 852, 857, n.8 (5th Cir. 1979) ("The first amendment and copyright are . . . mutually supportive. The financial incentive provided by copyright encourages the development and exchange of ideas which furthers the first amendment's purpose of promoting the 'exposition of ideas'")

federal court that has considered the issue has held that the fair use defense already encompasses First Amendment principles.[11] Petitioner can point to no resulting diminution in the rights of expression of the citizens of the Republic.

Henson does not claim that there is ambiguity in Section 107 of the Copyright Act or need for interpretation of that provision, nor does he point to legislative history that would support his proposed new *per se* rule.[12] Indeed, the legislative

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(quotations omitted); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 759 (9th Cir. 1978) ("the idea-expression line represents an acceptable definitional balance as between copyright and free speech interests") (quotation omitted), *cert. denied sub nom.*, *O'Neill* v. *Walt Disney Productions*, 439 U.S. 1132 (1979).

[11] *See, e.g.*, *Nihon Keizai Shimbun, Inc.* v. *Comline Bus. Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine"); *Los Angeles News Serv.* v. *Tullo*, 973 F.2d 791, 795 (9th Cir. 1992) ("First Amendment concerns are . . . addressed in the copyright field through the 'fair use' doctrine"); *New Era Publications Int'l, ApS* v. *Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("the fair use doctrine encompasses all claims of first amendment in the copyright field"); *Roy Export Co. Establishment of Vaduz, Liechtenstein* v. *Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1099 (2d Cir. 1982) ("No Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the 'fair use' doctrine").

[12] The only "authority" that he offers consists of the ruminations of a few law review article authors who have observed that there is a potential "tension" between the Copyright Act and the First Amendment. Of course, the Court does not sit to hear

history of the Copyright Act of 1976 emphasizes that the fair use doctrine is an"equitable rule of reason" requiring a "case-by-case" analysis, that "precludes the formulation of exact rules." H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. (1976) at 65-66. Contrary to Henson's contentions, the commercial, non-profit, or purported critical nature of a use is "not conclusive with respect to fair use, . . . and should be weighed along with other factors in fair use decisions." *Id.* at 66. *See Harper & Row*, 471 U.S. at 560. What Henson is really asking the Court to do is to usurp the legislative function and effectively amend Section 107. It is, of course, plainly improper to seek such relief from the judicial branch.[13/]

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theoretical cases about potential "tensions" or to resolve potential conflicts between a unanimous federal judiciary and a handful of law review article authors.

[13/] *See, e.g., United States* v. *Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy"); *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 194-95 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches").

III. Petitioner's Second Proposed Ground For Review Fails To Raise A Substantial Legal Question Justifying The Court's Exercise of Certiorari Jurisdiction

Petitioner's second proposed ground for review essentially argues that the district and circuit courts misapplied established legal doctrine to the facts and circumstances of this case. Petitioner makes no argument that the district or circuit courts applied a rule of law in conflict with the decisions of the Court or of other circuits. No such conflict is stated or identified.[14] Petitioner merely argues that the lower courts in this case erred in applying the established fair use doctrine, and that they should have found that petitioner's acts constituted fair use.[15]

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[14] To the contrary, petitioner pointedly ignores the decision in *Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2nd 1569 (E.D.Va. 1996), which found copyright infringement of various RTC unpublished works, including NOTS works, in a context similar to that obtaining in this case. Petitioner's citation (Pet. at 25) to an earlier interlocutory decision of the district court in *Lerma* thus is less than candid.

[15] Petitioner attempts to elevate his argument to one worthy of certiorari by conclusorily asserting that the court of appeals did not exercise independent review of the record, citing *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Putting aside the question of whether *Bose*-type independent review is required in a copyright case, there is nothing in the court of appeals' opinion to suggest that it did not exercise independent review. To the contrary, the court expressly stated that its review of the district court's grant of summary adjudication was *de novo*. The court provided a well-reasoned, albeit brief, opinion, which was justified by the lack of substance to Henson's arguments. Indeed, no case has ever found fair use where, as here, the defendant copied an entire unpublished work verbatim.

As we show below, petitioner is wrong, indeed clearly wrong. But even if the courts below blinked in their application of established law to the facts or in their fact finding, that would not be a proper basis to invoke this Court's certiorari jurisdiction. As recognized in Supreme Court Rule 10, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Indeed, Rule 10 reflects what:

> has always been the Court's practice, but so many petitions have been premised on just such asserted errors that reiteration of their likely futility has been thought necessary. The Court does not sit simply to correct such errors. For a variety of reasons, the Court must concentrate on those cases that present issues of truly national importance, for which there is some "compelling" reason for invoking the Court's jurisdiction.

Stern, Gressman, Shapiro & Geller, *Supreme Court Rules: The 1995 Revisions* at 9 (1997). *See C.J.D. Rudolph* v. *United States*, 370 U.S. 269, 270 (1969); *N.L.R.B.* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176, n.8 (1981).

In any event, the courts below properly applied established fair use doctrine in finding that Henson's infringement was not fair use, a finding confirmed by the jury's rejection of Henson's claim that he had even a good faith belief that his acts were protected by fair use. As the Court repeatedly has emphasized, the four standard fair use factors, as well as any other, are to be considered together, not in isolation; in fact, they overlap to a considerable degree. *Harper & Row*, 471 U.S. at 560-61; *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

The courts below properly found that the first fair use

factor — the purpose and character of the use — militates against a finding of fair use for three critical reasons. First, the fact that Henson copied the entire work verbatim is highly relevant, "for it may reveal a dearth of transformative character or purpose under the first factor [in addition to the third] . . ." *Campbell*, 510 U.S. at 587.

Second, especially when analyzed in conjunction with Henson's verbatim taking of the whole work, his limited commentary *relating to the work itself* substantially undercuts his claim to fair use. Petitioner attempts to make much of Henson's two page "open letter," characterizing it as "political speech" and "social commentary" directing criticism both at the district court and at the Church of Scientology. But the "open letter" dealt hardly at all with the work Henson gratuitously copied in its entirety. Only two sentences of Henson's "letter" address the content of NOTs 34, and they are directed at a single paragraph of the work consisting of 33 words; indeed, Henson makes his "point" by quoting eight words from the work.[16] Such limited commentary cannot by any stretch of the imagination justify copying and displaying the entire two page work verbatim:

> If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery of working up something fresh, the claim to fairness . . . diminishes accordingly (if it does not vanish) . . .

Campbell, 510 U.S. at 580. To justify a use as fair, a copier, even a parodist (which Henson was not), must show that the

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[16] Indeed, the "open letter" by itself demonstrates that it was unnecessary for Henson to copy and dispiay the entire work to engage in his public "commentary" and "criticism."

extent of the use was necessary to achieve his purpose: no more of a work may be taken than is "necessary to make the accompanying commentary understandable." *Supermarket of Homes, Inc.* v. *San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1409 (9th Cir. 1986). Here, Henson quoted eight words, commented on 33, but then proceeded to copy and display an entire two page work.

It was on this basis that the district court held that:

> The limited commentary in Henson's posting does not reveal that Henson's purpose was to educate the public about the alleged criminal content of NOTs 34. Further Henson does not sufficiently explain why he needed to post the entire text of NOTs 34 to educate the public.

Pet. at A15.[17] *Accord, Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2nd at 1574 ("The degree of copying by Lerma, combined with the absence of commentary on most of his internet postings, is inconsistent with the scholarship exception").

Third, the district court properly found that Henson's use "does not appear to be in good faith" (Pet. A16), a finding resoundingly reaffirmed by the jury. *See Harper & Row*, 471 U.S. at 562 ("Fair use presupposes 'good faith' and 'fair dealing'"). Henson not only ignored but defied RTC's cease and desist letters. He repeated his infringement, solicited others to infringe, and threatened to do so again himself.[18] He

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[17] The Petition does not accurately reproduce the district court's opinion; critical language in the above quoted passage was omitted from the reproduced opinion. The quotation in the text above is accurate.

[18] Indeed, Henson's open solicitation of additional unpublished NOTs works "acquired by . . . illegal means" (ER 89-91) so that he

failed to consult with an attorney, and he made no contact with law enforcement officials despite his bogus claim that NOTs 34 was a "criminal instruction manual." He knew that two other individuals had been enjoined from posting the very work he posted. He admitted that he copied the work out of spite (against "the jerks who pissed in my sandbox"), to achieve enhanced status, for fun and entertainment, and to impose substantial litigation and financial burdens on RTC. His attempt to drape himself in the banner of the First Amendment was properly rejected by the jury and the lower courts.

In light of these elements, the fact that Henson sought not fortune, but fame, and that his use was not essentially "commercial" does not render incorrect the lower courts' determination that the first fair use factor tilts decidedly against Henson: "the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character." *Campbell*, 510 U.S. at 584. The lower courts undoubtedly were correct in finding that Henson's bad faith verbatim copying of the entire work, without substantial commentary on the entire work itself, was not a fair use.

The district and circuit courts also properly found that the unpublished nature of NOTs 34[19] is decisive in this case with

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could copy, display and distribute them on the internet is precisely the kind of behavior the Court condemned as bad faith in *Harper & Row*, 471 U.S. at 563 (defendant "knowingly exploited a purloined manuscript"). *See also, Atari Games Corp.* v. *Nintendo of America, Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) ("To invoke the fair use exception, an individual must possess an authorized copy of a literary work"). However Henson obtained his copy of NOTs 34, it incontrovertibly was not an "authorized copy."

[19] Henson contends, in a footnote, that NOTs 34 is not really unpublished because "Scientology has already 'published' the

respect to the second fair use factor, the nature of the work.

The right to withhold publication of an unpublished work is a fundamental right of a copyright holder. *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 551 (1985) ("[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public"); *Salinger* v. *Random House, Inc.*, 811 F.2d 90 (2d Cir.), *supp'd on denial of rehearing*, 818 F.2d 252, *cert. denied*, 484 U.S. 890 (1987) (issuing preliminary injunction barring publication of excerpts from unpublished letters and recognizing value and importance of author's right of first publication).

Henson argues that under the 1992 amendment to Section 107 "unpublished works are to be treated the same as published works. . . ." (Pet. at 24.) This assertion is contrary to the language and legislative history of the amendment. The statute merely states, "The fact that a work is unpublished shall not *itself* bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107 (emphasis added). As the House Report explained:

> The word "itself" is designed to ensure that the courts do not erect a per se rule barring any fair use of unpublished works . . .
> At the same time, it is not the Committee's

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subject text to thousands of persons who have paid the proper fee. . . ." (Pet. at 24, n.25.) As is true of many of the "factual" assertions in the Petition, no evidence is proffered or exists in the record to support this statement, which is contrary to the findings of the courts below (Pet. at A3, A16), and is, in all events, untrue. *See Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231, 1245 (N.D. Cal. 1995); *Religious Technology Center* v. *Lerma*,, 40 U.S.P Q. 2nd at 1575 ("The works in question clearly have not been 'published'").

> intention to alter the weight currently given by the courts to the unpublished nature of a work under the second fair use factor. The general principles regarding fair use of unpublished works set forth by the Supreme Court in *Harper & Row* v. *Nation Enterprises* still apply.

H.R. Rep. No. 102-836, 102d Cong. 2d Sess. (1992) at 9. Thus:

> [I]n making any evaluation of a claim of fair use of unpublished material, the Supreme Court's holding that for purposes of the second statutory factor, the unpublished nature of the work is a "'key, though not necessarily determinative' factor tending to negate a defense of fair use," remains the law.

Id.

The district court properly discounted the relevance of the creative/factual distinction with respect to NOTs 34, on the ground that the distinction does not retain utility with respect to such a religious work. *See also, Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995). This derives from the fact that while the author of a religious work will assert its factual truth or validity, a non-believer is more likely to read it as creative. *See Bridge Publications, Inc.* v. *Vien*, 827 F. Supp. 629, 635-36 (S.D. Cal. 1993) ("Hubbard's works are the product of his creative thought process, and not merely informational"). The courts should not, indeed cannot, attempt to resolve such differing perspectives by characterizing a religious work as either factual or non-factual. *United States* v. *Ballard*, 322 U.S. 78 (1944).

The third fair use factor — the amount and substantiality of the portion of the work taken in relation to the entire work — decisively militates against a fair use finding because Henson

copied the entire work. This he cannot do under virtually any circumstance. Even in parody cases, where the parodist is permitted somewhat greater leeway to "conjure up" the original work, the exact or near verbatim copying of the original precludes fair use. *Benny* v. *Loew's, Inc.*, 239 F.2d 532, 536 (9th Cir. 1956), *aff'd by an equally divided Court sub nom. Columbia Broadcasting System* v. *Loew's, Inc.*, 356 U.S. 43 (1958); *Walt Disney Productions* v. *Air Pirates*, 581 F.2d 751, 757-58 (9th Cir. 1978). *See Campbell*, 510 U.S. at 579-80. As Professor Nimmer has stated, summarizing the cases, "whatever the use, generally, it may not constitute a fair use if the entire work is reproduced." Melville B. Nimmer & David Nimmer, 3 *Nimmer On Copyright* § 13.05(A)(3) at 13--184-85 (1999).[20]

Henson argues here (but did not argue in the court of appeals) that the district court erred in rejecting his contention that all of the 55 collectively-registered NOTs works constitute "the work as a whole" for purposes of the third fair use factor.[21] But the district court simply followed the clearly applicable and controlling copyright law, including the specifically applicable regulation which provides that where, as here, a series of unpublished works is registered as a collective work, the registration extends to each copyrightable element in the collection. *See* 37 C.F.R. § 202.3(b)(3)(i)(B). Although Henson argues that the district court's holding was "erroneous

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[20] Henson's argument that his "liability for copyright infringement should not depend on whether he quoted 10%, 50%, or 100% of NOTs 34" (Pet. at 27) thus is contrary to well-established law.

[21] Henson repeatedly and misleadingly states that he copied only 2 pages of a 700 page work, contrary to the explicit factual findings of the district court

because there is no showing that each work in the NOTs series is 'separately authored and constitutes a discrete original work of authorship'" (Pet. at 26, *citing American Geophysical Union* v. *Texaco, Inc.*, 60 F.3d 913, 926 (2d Cir. 1994),[22/] the district court, of course, had a copy of the work-in-suit and was perfectly capable of determining that it was discrete and finite, with an individual heading and closing, a start and a finish. It is wholly inappropriate for Henson to now ask this Court to review such a finding of fact by the trial court, a finding that he did not even challenge on appeal.

Henson also argues that even if the district court's determination as to what constitutes the "work as a whole" was not erroneous, the courts below nonetheless erred in not crediting Henson's contention that he "believed that he could not post any less of [NOTs 34] than he did and persuasively convey his message. . . ." (Pet. at 27.) But even if Henson legitimately held this "belief" — and, as shown above, Henson's true purpose in posting NOTs 34 in its entirety was personal amusement and the acquisition of status among his fellow Internet denizens — it would not constitute a defense to

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[22/] Notably, the district and circuit court opinions in *American Geophysical* recognized the very legal principle upon which the district court relied in this case, *i.e.*, "the 'work' analyzed for the purposes of the third fair use factor of 'amount taken' is the individual work, not the collective work." Pet. A18, *citing American Geophysical*. *Accord*, *Szabo* v. *Errisson*, 68 F.3d 940, 943 (5th Cir. 1995); *Religious Technology Center* v. *Lerma*, 40 U.S.P.Q. 2d at 1577 ("The works at issue [including works in the NOTs series] are combined in collections and . . . each subpart must be considered a 'single work' for purposes of fair use analysis"). Thus, once again, Henson does not raise a question of law, but merely a question, of no merit, concerning the district court's application of established law to the facts at hand.

copyright infringement. *See, e.g., Love* v. *Kwitny*, 706 F. Supp. 1123, 1133 (S.D.N.Y. 1989) (defendant's use of "huge portion" of copyrighted work to "give his readers the 'full flavor' and lend 'an air of authenticity' to his work "does not make his use 'fair' for copyright purposes"); *Craft* v. *Kobler*, 667 F. Supp. 120, 126 (S.D.N.Y. 1987) ("The claim of fair use would, of course, be abused by quoting an entire chapter to support the argument that the writing style suggested Craft's and not Stravinsky's authorship"); *Salinger* v. *Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) (there is "no inherent right to copy the 'accuracy' or the 'vividness' of [an author's] expression").

Petitioner fastens on the fourth fair use factor — "the effect of the use upon the potential market for or value of the copyrighted work" — as mandating a finding of fair use, no matter what or how the other factors weigh in the analysis. That is not the law. The fourth factor, like the others, "must always be judged in conjunction with the other three criteria." *Marcus* v. *Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983), *citing* H.R. Rep. No. 90-83, 90th Cong. 1st Sess. (1967) at 35. *See also*, H.R. Rep. No. 94-1476, 94th Cong. 2d Sess. (1976) at 65-66. Courts have found no fair use even where the copyright holder failed to prove that the infringing use would have *any* effect on either the present or future market for the work. *See, e.g., Lish* v. *Harper's Magazine Foundation*, 807 F. Supp. 1090, 1104 (S.D.N.Y. 1992).

Here, the district court found that the fourth criteria "weighs slightly in Henson's favor" (Pet. A20), but that RTC's "strong showing with respect to the other factors requires a finding of no fair use as a matter of law." *Id.* The district court properly considered not only whether Henson's act itself would cause RTC market harm, but also, following *Campbell*, 510 U.S. at 590, "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the

original. *See also Harper & Row*, 471 U.S. at 568 ("to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work'").

RTC showed that Henson's copying paralleled that of other participants on the a.r.s. newsgroup, that other persons had misappropriated RTC's unpublished copyrighted works to engage in for profit activities that did cause RTC economic harm, and that RTC had been forced to institute a number of successful legal actions against such infringers.[23] Thus, if the acts of Henson and others were not enjoined, the potential for widespread adverse impact upon RTC would be exacerbated exponentially. Indeed, the district court pointedly noted that "Henson does not dispute this point" (Pet. A19), an implicit concession noted by the court of appeals. Given that danger, the district court certainly did not clearly err in finding that, at most, the fourth factor weighs only slightly in Henson's favor, and was strongly outweighed by the other factors and equitable considerations. Similarly, the court of appeals' reference to Henson's implicit concession was properly considered by it in weighing all the fair use factors. There can be no reason for the Court to revisit this essentially factual analysis in a case such as this, where the evidence of intentional, willful, and bad faith infringement is overwhelming.

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[23] *See, e.g., Religious Technology Center* v. *Ward*, No. 96-20207-RMW (N.D. Cal.), (granting preliminary injunction, subsequently converted to permanent injunction); *Religious Technology Center* v. *Netcom*, 923 F. Supp. 1231 (C.D. Cal. 1995) (granting preliminary injunction, subsequently converted to permanent injunction); *Religious Technology Center* v. *Lerma*, 40 U.S.P.Q.2d 1569 (E.D. Va. 1996) (granting permanent injunction and damages); *Bridge Publications, Inc.* v. *Vien*, 827 F. Supp. 629 (S.D. Cal. 1993) (granting RTC permanent injunction and damages).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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